United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1393

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, : Docket No. 75-1393

- against - :

JOE TRUMAN BOYD, :
ERNEST DARWIN GOODLOE,
ROBERT E. FORD, :
ERNEST R. MULLENAX
and M. S. KNISELY, :

Appellants. :

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PETITION FOR REHEARING IN BANC FOR
DEFENDANT-APPELLANT ERNEST R. MULLENAX

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JOSEPH B. EHRLICH,
Of Counsel.

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PETITION FOR REHEARING IN BANC

Ernest R. Mullenax petitions this Court for a hearing in banc primarily to consider a development recently established by a minority of the Court which proffers a precedent in conflict with prior decisions of different panels of the Court, and which precedent is in manifest contradiction to fundamental and essential procedural due process rights of the appellant.

The Panel Decision

On April 15, 1976, a three-member panel of this Court, consisting of Hon. Tom C. Clark, Hon. William H.

Timbers and Hon. Ellsworth A. VanGraafeiland, reversed the conviction of defendant Mullenax on forty-two substantive counts. Appellant originally was convicted by jury of fifty-one of the fifty-three counts contained in indictment 75 CR 140. The panel stated that:

> "Under all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed on Mullenax on the counts which are affirmed. See United States v. Blitz, slip op. 2761, 2795 n. 46 (2 Cir. March 25, 1976)."

Mullenax's case, however, differs materially from the situation in Blitz. In any event, it is submitted that regardless of Blitz, fundamental and essential due process compels that the sentencing court be allowed to reconsider its sentence in view of the material change in existing fact.

Mullenax's Sentence

On December 2, 1975, Hon. Milton Pollack, United States District Judge for the Southern District of New York, imposed a term of incarceration of two years with all except six months suspended on each of the fifty-one counts on which Mullenax stood convicted, to run concurrently. Additionally, Judge Pollack imposed a two-year period of probation and a $10,000.00 fine with respect to the conspiracy count.

Argument

Under existing and predominant concepts in our jurisprudence, Mullenax's case should have been remanded by the panel to allow the sentencing court an opportunity to reconsider its original sentence in light of the reversal of forty-two counts of the fifty-one on which Mullenax originally stood convicted. In an array of decisions by this Court it was clearly established that under the circumstances attendant to Mullenax's case, that the panel ought to have remanded Mullenax's case to the district court for reconsideration of sentencing. In United States v. DeMarco, 488 F. 2d 828, 833 (2 Cir. 1973), this Court, by way of a panel consisting of Kaufman, C. J., Smith and Oakes, stated:

> "Since the trial court imposed idential concurrent sentences on the substantive and conspiracy counts for all four appellants and we today have reversed the conspiracy convictions, itis appropriate that we remand the case to the District Court for review of sentence. We do so because of the possibility that conviction on both counts might have effected the punishment for each (emphasis supplied)....Of course we do not imply any views as to whether the sentences should be modified in any respect. We leave the sentences to be imposed entirely to the discretion of the trial judge."

In United States v. Mancuso, 485 F. 2d 275, 283 (2 Cir. 1973), a panel, consisting of Kaufman, C. J., Moore

and Mansfield, likewise stated:

> "Since the trial court imposed identical concurrent sentences on count 2 and 3 and we have today reversed the conviction on count 2, it is appropriate that we remand the case to the District Court for review of sentence. We do so because of the possibility that conviction on both counts might have effected the punishment set for each (emphasis supplied)."

In United States v. Sperling, 506 F. 2d 1323 (2 Cir. 1974), a panel, consisting of Friendly, Timbers and Thomsen, similarly set forth:

> "Since Del Busto and Garcia received concurrent sentences on two counts and since the fact of conviction on both counts might have effected the sentences imposed for each, (emphasis supplied) we remand for reconsideration of sentence. See United States v. Rizzo, 491 F. 2d 1235, 1236 (2 Cir. 1974); United States v. DeMarco, 488 F. 2d 828, 833 (2 Cir. 1973); United States v. Mancuso, 485 F. 2d 275, 283 (2 Cir. 1973); United States v. Mapp, 476 F. 2d 67, 83 (2 Cir. 1973); United States v. Hines, 256 F. 2d 561, 564 (2 Cir. 1958)."

Without doubt, Mullenax's conviction on forty-two additional counts may have very well influenced the overall decisions of Judge Pollack in regard to the sentence which he imposed on December 2, 1975. Equally, this Court has made it more than clear in more than one instance that in the circumstances attendant to this case that the matter of sentencing should have been allowed to have been reconsidered

by the sentencing court in light of the reversal of forty-two of the fifty-one counts on which Mullenax originally stood convicted.

To supplement the above-stated argument, this Court's decision in United States v. Slutsky, 514 F. 2d 1222 (1975), is duly noted to the Court. In that case defendants had been sentenced to a term of incarceration pursuant to Title 18 United States Code Section 4208(a)(2). Immediately subsequent to the time of imposition of sentence by Hon. Lloyd F. MacMahon, United States District Court Judge for the Southern District of New York, the United States Board of Parole significantly amended its procedures in considering parole release, which procedures affected those incarcerated pursuant to an (a)(2) sentence. Consequently, this Court held that in view of the material change of fact, of which the sentencing court had not been originally aware, defendants' case ought to be remanded to allow the sentencing court an opportunity to reconsider its original sentence in light of the new Parole Board development. Clearly, the material change in fact resulting from the reversal of forty-two counts, under similar reasoning, compels that Mullenax's case too be remanded to allow the sentencing

court reconsideration. As consistently noted by this Court, the fact of remand for reconsideration in terms of sentencing does not itself imply that this Court feels that Mullenax's sentence as imposed by Judge Pollack should necessarily in any way be altered or amended. However, the easily performed procedural process does permit Judge Pollack the opportunity to reconsider Mullenax's sentence in light of the material change of fact.

It is further noted that Mullenax's situation is far different and is markedly apart from the circumstances before this Court in United States v. Blitz, supra. In Blitz, Judge Timbers writing for the majority noted as follows:

> "In the instant case, however, with respect to the counts which we reverse pursuant to the Government's concession, suspended sentences were imposed on Drew on counts 7-12 and imposition of sentence was suspended on Orpheus on counts 7-12 and 14-17."

As already expressed, this clearly is not the case at bar. Mullenax was given a definite sentence with regard to each count regardless of the fact that the sentence imposed on each count was to run concurrently with all others. Notwithstanding anything contained in Blitz, it is submitted that consistent with the views previously expressed

by this Court as cited above, that it is manifest that the sentencing court be allowed to reconsider the reversal of forty-two counts in terms of its imposition of sentence on December 2, 1975. No harm at all is done by the remand; only the interests of justice are served.

Additional Points

Immediately following is Mullenax's application for recall and stay of the reissuance of the mandate in the case herein pending his petition for certiorari to the Supreme Court and final disposition therein of the case, with supporting affidavit, which papers were filed with this Court on April 20, 1976. Points A, B and C in the supporting affidavit present further questions this Court may desire to consider and review in banc.

Conclusion

For all the reasons set forth above and in our papers previously submitted and on file with this Court, the petition for rehearing in banc should be granted, and the mandate recalled and stayed and Mullenax continued on bail conditions pending the rehearing in banc or the petition for certiorari and final disposition of the case

in the Supreme Court, whichever is greater. To the extent appellant Mullenax joined in the arguments presented by co-appellants on appeal, he respectfully joins in any petition for rehearing submitted by any co-appellant.

Respectfully submitted,

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JOSEPH B. EHRLICH,
Of Counsel.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	Docket No. 75-1393
Appellee,	:	
- against -	:	MOTION FOR RECALL AND STAY OF REISSUANCE OF MANDATE
JOE TRUMAN BOYD, ERNEST DARWIN GOODLOE, ROBERT E. FORD, ERNEST R. MULLENAX and M. S. KNISELY,	:	
Appellants.	:	

Appellant Ernest R. Mullenax makes application to this Court pursuant to Title 28 United States Code Section 2101(f) and Rule 41(b) of the Federal Rules of Appellate Procedure for recall of the mandate and entry of an order staying its reissuance with reference to the appellant Mullenax pending the filing of a petition for certiorari in the Supreme Court of the United States and until final disposition therein of the case, and for such other and further relief as this Court may deem just and proper.

Dated: Garden City, New York,
April 19, 1976.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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UNITED STATES OF AMERICA, : Docket No. 75-1393

Appellee, :

- against - : AFFIDAVIT

JOE TRUMAN BOYD, :
ERNEST DARWIN GOODLOE,
ROBERT E. FORD, :
ERNEST R. MULLENAX
and M. S. KNISELY, :

Appellants. :

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
) ss:
COUNTY OF NASSAU)

JOSEPH B. EHRLICH, being duly sworn, deposes and says:

I make this affidavit in support of appellant Mullenax's application to this Court for recall of the mandate and for the stay of its reissuance pending filing of a writ of certiorari to the Supreme Court and final disposition of the case by the High Court.

It is the bona fide intention of the appellant Mullenax to make proper and timely application to the High Court for writ of certiorari. It is respectfully submitted by your affiant, who was both trial and appellate counsel for Mullenax, that the grounds upon which said petition for certiorari will be based are both substantial and meritorious. It is believed that the issues to be brought to the High Court by way of the petition are ones which the Supreme Court likely may wish to determine and resolve. Succinctly, the grounds presently contemplated are substantially as follows:

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A. Conflict exists in the circuit courts as to whether the pledge of securities with reference to loan transactions at banks or other lending institutions is a sale for purposes of the Securities Act of 1933 or the Securities Exchange Act of 1934. While this circuit by way of United States v. Gentile, Dkt. No. 75-1283 (2d Cir., Feb. 10, 1976), slip op. 1851, holds in support of the appellee, the Fifth Circuit in McClure v. First National Bank of Lubbock, 497 F. 2d 490 (1974), cert. denied, 420 U.S. 930 (1975), is overtly to the contrary, in support of appellant Mullenax's position to this Court on appeal, and in accord with the Supreme Court's decision in United Housing Foundation, Inc. v. Forman, _____ U.S. _____, 95 S. Ct. 2051 (1975).

Mullenax's entire connection with the indictment was in terms of the pledge of stock with reference to loan transactions. In United Housing Foundation, Inc. v. Forman, supra, the Court found that the purchase of stock in a housing cooperative as a prerequisite for securing a lease of an apartment was not a sale within the scope or purview of the Securities Act of 1933 or the Securities Exchange Act of 1934. Mullenax's pledge of stock to a bank and business trust, similarly, was a prerequisite to securing a loan, which loan stood totally separate and apart from any use of the stock. In both the case before the High Court and in Mullenax's case, the use of the stock was separate and independent (i.e. "collateral") from the central economic transaction. McClure, in which case certiorari was denied by the High Court, is apposite to Mulleanax's position. Consequently, the issue is one that ought to be determined and resolved by the High Court.

B. The decision reached by this Court in the determination of Mullenax's appeal manifestly was contradictory to the

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reasoning of the Fifth Circuit in Bland v. United States, 299 F. 2d 105 (1962). The trial court's failure to reinstruct as to the critical elements of knowledge, willfulness and intent, pursuant to Mullenax's counsel's request, at the time it forwarded to the jury copies of the statutes with which the defendants at trial were criminally charged, it is strenuously submitted, was harmful error and denied appellant Mullenax a fair trial. The statutes did not themselves embody the critical elements of knowledge, willfulness and intent.

It is submitted that the Supreme Court may wish to consider the apparent different outlook given this kind of action by the Second and Fifth Circuits. Also compare, United States v. Borden, 514 F. 2d 1301, 1309 (D.C. Cir., 1975); United States v. Harris, 388 F. 2d 373, 377 (7th Cir., 1967). Also see, United States v. Boerner, 508 F. 2d 1064 (5th Cir., 1975). It also will be asserted that in line with the Second Circuit's own reasoning in Haymes v. Regan, 525 F. 2d 540 (1975), where an appellant's position is to a significant degree supported by firm law and precedent in other circuit courts, that the grounds and essential facts surrounding the affirmance should be set forth with some specificity.

C. It was expressly held in Kastigar v. United States, 406 U.S. 441, 460-462, that since a defendant's Fifth Amendment rights were coextensive only with use and derivative-use immunity, that a defendant would "not [be] dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities," but would be given the opportunity to examine whether immunized testimony was used in any respect with regard to the infliction of criminal penalties. The High Court clearly

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stated that the Government would have "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." The trial court departed from the standard set forth in Kastigar. See United States v. Boyd, 404 F. Supp. 413 (S.D. N.Y. 1975). It will also be asked that the High Court reconsider the decisions in United States v. Calandra, 414 U.S. 338 (1975) and Costello v. United States, 350 U.S. 359 (1956), to an extent which would support Mullenax's position that his inclusion in indictment 75 CR 140 was improper in the first instance.

D. This Court reversed appellant Mullenax's conviction on forty-two substantive counts. Consequently, the case should have been remanded to allow the trial court an opportunity to reconsider its original sentence in light of the development. If Judge Pollock originally imposed sentence with regard to nine rather than fifty-one counts, such consideration may very well have affected the sentence which he imposed. See United States v. Sperling, 506 F. 2d 1323, 1343 (1974), and cases cited in support of remand for re-sentencing. Cf. United States v. Slutsky, 514 F. 2d 1222 (2d Cir. 1975).

Mullenax's situation differs markedly from the circumstances in United States v. Blitz, slip op. 2761, 2795 n. 46 (2d Cir. March 25, 1976). At the time of imposition of sentence Judge Pollock sentenced Mullenax on each of fifty-one counts to a two-year period of imprisonment with all except six months suspended, to run concurrently. Additionally, Mullenax was fined $10,000 with respect to the conspiracy count and a two-year period of probation was imposed. In Blitz this Court related:

> "In the instant case, however, with respect to the counts which we reverse pursuant to the government's concession, suspended sentences were imposed

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AND ROCKMAN

on Drew on Counts 7-12 and imposition of sentence was suspended on Orpheus on Counts 7-12 and 14-17."

This is not the case at bar. It is submitted that the sentencing court should reconsider its original sentence in light of the dismissal of forty-two counts, on which each count a term of imprisonment was imposed.

WHEREFORE, appellant Mullenax moves the Court for an order recalling and staying the reissuance of the mandate herein pending the filing of a petition for certiorari in the Supreme Court and until final disposition therein of the case. Inasmuch as Mullenax has been advised that he must surrender April 29, 1976, it is respectfully asked that this Court expeditiously consider this application which we believe to be of requisite substance and merit.

Joseph B Ehrlich

JOSEPH B. EHRLICH

Sworn to before me, this
19th day of April, 1976.

Catherine J. Collado

CATHERINE J. COLLADO
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-5760450
Qualified in Nassau County
Commission Expires March 30, 1978

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of April, one thousand nine hundred and seventy-six.

Present:

HON. TOM C. CLARK
Associate Justice, United States Supreme Court, Retired
HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

UNITED STATES OF AMERICA, Appellee, v. JOE TRUMAN BOYD, ERNEST DARWIN GOODLOE, ROBERT E. FORD, ERNEST R. MULLENAX and M. S. KNISELY, Appellants.	75-1393 75-1424 75-1426 75-1432 76-1048

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of said District Court be, and they hereby are, affirmed as to all appellants on all counts upon which they were convicted, except that, pursuant to the government's concession, the conviction of appellant Mullenax is reversed on substantive counts 2-26, 29-37 and 41-48. Under all the circumstances, it is neither necessary nor appropriate to remand for reconsideration of the sentence imposed on Mullenax on the counts which are affirmed. See United States v. Blitz, slip op. 2761, 2795 n. 46 (2 Cir. March 25, 1976).

We have carefully considered all of appellants' claims of error and we find them to be without merit. Appellants were convicted of serious crimes after a fair trial on the basis of overwhelming evidence. We order that the mandate issue forthwith.

Tom C. Clark
TOM C. CLARK
Associate Justice

Wm H. Timbers
WILLIAM H. TIMBERS

Ellsworth A. Van Graafeiland
ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges.